No. 97-300

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1997

TERRY L. STEWART, Director,
Arizona Department of Corrections, et al.,

Petitioners,

vs.

RAMON MARTINEZ-VILLAREAL,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

BRIEF FOR RESPONDENT

PAUL BENDER
Arizona State University
College of Law
Tempe, AZ 85287-7906
(602) 965-2556

SEAN D. O'BRIEN
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110
(816) 363-9371

FREDRIC F. KAY
Federal Public Defender
*DENISE I. YOUNG
DALE A. BAICH
Assistant Federal Public Defender
97 E. Congress Suite 130
Tucson, AZ 85701-1716
(520) 620-7043

Attorneys for Respondent
**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

1. Did the court below err in holding that Mr. Martinez-Villareal's federal habeas corpus petition presenting only a claim of incompetence to be executed was not a "second or successive" application within the meaning of amended 28 U.S.C. § 2244(b) where the incompetency claim had been presented in an earlier petition but dismissed without prejudice as premature upon the insistence of the State of Arizona that the time and place to litigate it was in a subsequent petition like the one now in issue?

2. Did the court below err in considering, among the factors bearing upon its construction of the statute, the principles that statutes should be given a reasonable construction that avoids needless constitutional adjudication and absurd results?

3. Does this Court have *certiorari* jurisdiction to review the decision below and, if not, is there any sufficient cause for it to exert its extraordinary-writ power to relieve Arizona of the consequences of Arizona's own successful efforts to channel federal court consideration of Mr. Martinez-Villareal's incompetency claim into the present forum?

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OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals' panel in *Martinez-Villareal v. Stewart, et al.*, is printed at JA 179 and is reported at 118 F.3d 628 (9th Cir. 1997).

JURISDICTION

One of the questions which this Court granted certiorari to decide was whether it has jurisdiction to review this case. *See* Petitioners' Brief at i. As we discuss in Argument III below, pursuant to 28 U.S.C. § 2244(b)(3)(E) of the Antiterrorism and Effective Death Penalty Act of 1996, this Court does not have statutory certiorari jurisdiction over this case. Moreover, no reasons exist for this Court to employ an extraordinary writ to consider this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Fifth Amendment to the Constitution of the United States, which provides in part:

> No person shall be . . . deprived of life . . . without due process of law . . .

The Fourteenth Amendment to the Constitution of the United States, which provides in part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

28 U.S.C. § 2241. Power to grant writ

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court, any justice thereof, and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

28 U.S.C. § 2243.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

. . .

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application

for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless –

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

. . .

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

. . .

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

28 U.S.C. § 2254:

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

Rule 2, Rules Governing Section 2254 Cases In The United States District Courts:

. . .

(d) a petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision). If a petitioner desires to attack the validity of the judgments of two or more state courts under which he is in custody or may be subject to future custody, as the case may be, he shall do so by separate petitions.

STATEMENT OF THE CASE

Respondent Ramon Martinez-Villareal is a mentally retarded, mentally ill, brain-damaged Mexican citizen who has been sentenced to death by the State of Arizona

as an accomplice to a robbery during which two men were shot to death. Mr. Martinez-Villareal was represented at trial by William Rothstein,[1] who also represented him on direct appeal, *State v. Martinez-Villareal*, 145 Ariz. 441, 702 P.2d 670, *cert. denied*, 474 U.S. 975 (1985), and in his first state postconviction proceeding. During this state postconviction proceeding, a warrant was issued for Mr. Martinez-Villareal's execution, and he attempted to petition the U.S. District Court for federal habeas corpus relief and obtained a stay of execution from the district court. The State of Arizona successfully moved to dismiss each of Mr. Martinez-Villareal's federal habeas petitions on the grounds that they contained claims on which state remedies had not been exhausted. JA 8.

In late 1990, following the state court's denial of Mr. Martinez-Villareal's second postconviction proceedings, Sean Bruner was appointed by the U.S. District Court to represent Mr. Martinez-Villareal in his federal habeas petition. Mr. Bruner soon discovered that his client had been treated for schizophrenia with anti-psychotic medication by Arizona Department of Corrections physicians

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[1] The district court found that Rothstein's trial representation was constitutionally ineffective because he failed to investigate and present evidence of Mr. Martinez-Villareal's obvious mental deficiencies in mitigation of punishment. *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, at 20-30 (D. Ariz. Oct. 21, 1994) (unpublished). That determination was reversed on procedural default grounds because the allegations had been omitted from the first state postconviction petition in which Mr. Martinez-Villareal was still being represented by Rothstein. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1305-06 (9th Cir.), *cert. denied*, 117 S.Ct. 588 (1996).

since 1986. Mr. Bruner pursued several claims relating to Mr. Martinez-Villareal's impaired mental condition, including his lack of competence for execution. JA 7-11.

Mr. Bruner's first attempt to raise the competency for execution claim in federal court again met with a motion to dismiss by Arizona on the grounds that the claim was not exhausted. JA 8. At that time, and until 1993, Arizona statutes provided that only the warden of a correctional facility could initiate judicial proceedings to determine a prisoner's mental fitness for execution. Ariz. Rev. Stat. §§ 13-4021 *et seq.* (1978) (repealed 1993). The district court stayed the federal proceedings, and Mr. Martinez-Villareal's counsel returned to state court to exhaust this claim. *Martinez-Villareal v. Lewis*, 80 F.3d 1301, 1304-1305 (9th Cir.), *cert. denied*, 117 S.Ct. 588 (1996). The Arizona courts refused to review the claim under the state's post-conviction rule, and the warden of the institution in which Mr. Martinez-Villareal was confined refused to initiate the statutory procedures despite Mr. Martinez-Villareal's history of mental illness in prison. JA 9.[2] Thereafter, on March 26, 1993, counsel for Mr. Martinez-Villareal filed an amended federal habeas petition raising,

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[2] Mr. Bruner petitioned for certiorari from Arizona's refusal to entertain the competency to be executed claim. Arizona urged this Court to deny review because, through his federal habeas petition, "[Mr. Martinez-Villareal] has ready recourse to a federal forum if reasonable efforts to exhaust his state remedies do not result in an outcome which he feels is satisfactory, so *there is no chance of him being executed without there being an opportunity for him to litigate his claim.*" *Martinez-Villareal v. State of Arizona*, No. 92-5373, Respondent's Brief in Opposition to Petition for Writ of Certiorari, p. 15 (emphasis added).

among other claims, his now exhausted but still unadjudicated claim that he was mentally unfit for execution. JA 112.

Counsel for Arizona asked the district court to dismiss the competence for execution claim without prejudice on the grounds that the issue was not ripe, arguing that "[o]nly if a warrant for [Martinez-Villareal's] execution issues, and if he still claims to be incompetent at that time, will there be a jurisdictionally sufficient case or controversy, and *that will be the time to litigate the issue.*" JA 6 (emphasis added). On behalf of Mr. Martinez-Villareal, Mr. Bruner responded that the state's position was inconsistent with its earlier claim that the competency issue was unexhausted. JA 8-9. Arizona responded that "to do a competency determination now would be futile, because it would certainly have to be repeated when the time for execution finally arrives." JA 19.

The district court conducted a hearing upon Mr. Martinez-Villareal's habeas petition, at which Mr. Bruner presented evidence of his client's mental illness. The district court found the evidence of mental incapacity persuasive, and granted the writ as to the death sentence on the ground that Mr. Martinez-Villareal's trial counsel had been ineffective in failing to discover and present such evidence at his sentencing hearing. *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB (D. Ariz. Oct. 21, 1994) (unpublished); *Martinez-Villareal v. Lewis*, 80 F.3d at 1305. Mr. Martinez-Villareal's other federal claims were rejected, except for the claim that he was mentally unfit for execution. On that issue, the district court accepted the position of the State of Arizona that the claim was not ripe for review, stating that "[t]his claim is premature and

is denied without prejudice." *Martinez-Villareal v. Lewis*, CIV 86-296-TUC-RMB, *supra*, p. 19.

Arizona appealed the district court's order granting sentencing relief on the ineffectiveness of counsel claim. The Ninth Circuit held on April 4, 1996, that the district court should not have reached the merits of that claim because it was procedurally defaulted when it was not raised in the first state postconviction proceedings where trial counsel continued to represent Mr. Martinez-Villareal. With respect to the competency for execution issue, the Court of Appeals stated:

> [T]o eliminate any ambiguity, we reiterate that the claim of Martinez-Villareal's current incompetence was denied as premature by the district court. That decision was not challenged on appeal. Our instruction to enter judgment denying the petition is not intended to affect any later litigation of that question.

Martinez-Villareal v. Lewis, 80 F.3d at 1309 n.1. Twenty days later, President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").

Upon denial of certiorari in December, 1996, counsel for Arizona moved in the Arizona Supreme Court for a warrant of execution. Counsel for Mr. Martinez-Villareal promptly moved for a state competency hearing pursuant to the now amended Arizona statute.[3] Thereafter, on February 28, 1997,

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[3] Arizona states that Mr. Martinez-Villareal's counsel "finally" moved for a competency hearing, Petitioners' Brief, p. 3, as if counsel for Mr. Martinez-Villareal had not already attempted over Arizona's repeatedly successful objections to present his claim to every administrative official and state and federal court conceivably having jurisdiction over the matter.

the district court, in accordance with the mandate of the Ninth Circuit, entered an order providing that "Petitioner Ramon Martinez-Villareal's Claim 4.16 regarding competency to be executed is DENIED WITHOUT PREJUDICE." JA 20.

On March 12, 1997, counsel for Mr. Martinez-Villareal moved in the district court for reconsideration of the February 28, 1997 dismissal order, expressing concern that amended 28 U.S.C. § 2244 might be asserted by the State as a bar to raising the competency claim in a future federal habeas petition. Counsel noted that "in light of the understanding of all parties that petitioner's claim to incompetence to be executed would await a future hearing, it would be a cruel injustice to now find that petitioner's challenge was barred as a successive claim." JA 24. Counsel also advised the district court that this Court had recently granted certiorari in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), to consider the retroactivity principles applicable to the AEDPA.[4] *Id*. Counsel for Arizona gave the district court no indication that they intended to take the position that a subsequent petition raising the competency claim would be barred under amended § 2244. The district court denied reconsideration as unnecessary to preserve the claim:

> After considering Petitioner's arguments, the Court finds no reason to grant the requested

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[4] This Court later decided *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), holding that the AEDPA does not apply retroactively to habeas cases filed before the effective date of the AEDPA, on the same day that the court below filed its opinion allowing Mr. Martinez-Villareal to proceed with his unadjudicated competency claim. JA 179.

> relief. That particular claim could not even be construed as an unexhausted claim since it was not ripe when it was presented. For this reason, the Court dismissed it without prejudice. Therefore, the Court has no intention of treating the "incompetency to be executed" claim as a successive petition.

JA 25-26. Mr. Martinez-Villareal filed a timely notice of appeal from the district court's refusal to reinstate the habeas petition.

On the same day that counsel filed his motion to reconsider, March 27, 1997, the Arizona Supreme Court granted the State's earlier motion and issued a warrant ordering petitioner Stewart to execute Mr. Martinez-Villareal on April 16, 1997 – a date later rescheduled for May 21, 1997. JA 27. Thereafter, proceedings were conducted in the Arizona Superior Court on Mr. Martinez-Villareal's mental condition. After an expedited hearing in which counsel for Mr. Martinez-Villareal were able to present some, but not all, relevant evidence regarding Mr. Martinez-Villareal's mental condition,[5] Superior Court Judge Boyd T. Johnson concluded that "credible testimony and medical evidence was presented at the hearing herein that [Martinez-Villareal] may suffer from a mental illness, mental retardation and/or organic brain damage." JA 47.

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[5] Judge Johnson rejected the request of Mr. Martinez-Villareal's counsel for an assessment of Mr. Martinez-Villareal's mental retardation and brain damage, which his counsel argued was necessary to determine his mental capacity, especially with respect to his ability to connect the punishment of death with his conviction for murder. JA 33-34. *See Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring in part and concurring in judgment).

However, Judge Johnson nevertheless found Mr. Martinez-Villareal competent to be executed under Arizona law. JA 48.

Counsel for Mr. Martinez-Villareal sought review in the Arizona Supreme Court challenging the fairness and reliability of the competency proceedings on several grounds, including the Superior Court's refusal to allow testing to assess the degree of mental retardation and brain damage, the constitutional inadequacy of Arizona's competency to be executed standard, and the insufficiency of the evidence to establish Mr. Martinez-Villareal's ability to understand the connection between his punishment of death and the crime for which he was convicted. The Arizona Supreme Court denied review on May 16, 1997, with two judges writing separately expressing concern about the propriety of Mr. Martinez-Villareal's execution in light of the fact that "the evidence makes it clear that [Martinez-Villareal] is mildly retarded and seriously mentally ill." JA 166.

Counsel for Mr. Martinez-Villareal moved to be appointed in the district court and sought expert assistance in the preparation and presentation of the now-ripe competency claim that remained unadjudicated at Arizona's request. JA 30-41. In response, Arizona for the first time asserted amended § 2244(b) as a bar to Mr. Martinez-Villareal's competency claim. JA 66. The district court, now believing that the AEDPA deprived it of jurisdiction to act, entered an order stating:

> Although this Court may not review the Petitioner's competency to be executed at this time, the Court recalls that it had the opportunity to observe the Petitioner in 1994. This Court can

> only state that its observations of Petitioner in 1994 called into serious doubt [Martinez-Villareal's] competence.

JA 104.

Counsel for Mr. Martinez-Villareal moved in the Court of Appeals for permission to proceed in the district court on his competency claim, presenting alternative grounds for permitting the district court to review the claim. Counsel argued that Mr. Martinez-Villareal had "not filed a second petition," but that this was "his first petition." JA 126. Counsel also argued that given the procedural artifice employed by the State to avoid any federal litigation of the competency claim, equitable principles required application of pre-AEDPA law to Mr. Martinez-Villareal's competency claim, citing *Burris v. Park*, 95 F.3d 465, 469 (7th Cir. 1996) (finding under similar circumstances an equitable exception to the 7th Circuit's determination in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996), *reversed*, 117 S.Ct. 2059 (1997), that the AEDPA is retroactive). JA 120-25. Counsel for Mr. Martinez-Villareal further argued that "[n]othing in the legislative history or text of [§ 2244] indicates an intent to divest federal courts of jurisdiction to enforce any right recognized under the federal constitution." JA 126. After this statutory construction argument, counsel suggested that interpreting § 2244(b) to bar Mr. Martinez-Villareal's competency claim under the unusual circumstances of his case "raises serious questions under the Suspension Clause." JA 128. On May 17, 1997, the Court of Appeals stayed Mr. Martinez-Villareal's execution and ordered accelerated briefing and oral argument, expressing preliminary concern with the Suspension Clause issue. JA 175-77.

Following briefing and argument, the court below based its decision on statutory grounds. It held that the prohibition of second or successive habeas petitions under § 2244 did not apply to Mr. Martinez-Villareal's competency claim. The court noted that Mr. Martinez-Villareal had diligently raised this claim in his first petition, but that "it was the State of Arizona that had suggested to the district court that Martinez-Villareal's competency claim was not ripe for adjudication." JA 181 n.1. The claim remained unadjudicated because the district court and Court of Appeals had concluded that it was premature when it was raised in the first federal habeas petition. Those courts had therefore rendered judgments preserving Mr. Martinez-Villareal's right to an adjudication of the issue when it became timely. JA 181.

Although the court below expressed concern that under the "narrow circumstances" of Mr. Martinez-Villareal's case, "the new statute poses a serious constitutional problem," it ruled:

> We need not decide this difficult constitutional question because we conclude that Martinez-Villareal's competency claim does not fall within the rubric of section 2244.

JA 188. Referring to *In re Turner*, 101 F.3d 1323 (9th Cir. 1996), the court concluded that

> just as we permit an exhausted petition to be heard in federal court even after it had been dismissed previously as unexhausted, so too should we permit a ripe competency claim to be heard in federal court even after it had been dismissed previously as premature. *Turner* reached this result to ensure that a petitioner's

> federal claims are accorded one hearing in federal court. We now extend *Turner* to competency claims that previously were dismissed without prejudice as premature in order to ensure that such claims are likewise subject to federal review.

JA 191.

Thus, contrary to Arizona's assertion here, the suspension of the writ issue did not control the ruling below. Rather, the court focused on the statutory phrase "second or successive" petition in § 2244(b), and framed a narrow rule based upon the historical meaning of that concept:

> Our holding is a narrow one that is inherently limited by the unique nature of a competency claim. Indeed, we can think of no other situation where a first petition meets *Rose [v. Lundy]*'s exhaustion requirement but a claim raised by that petition must be tabled as premature. We extend *Turner* to this circumstance, and this circumstance only.

JA 193-94.

Since the competency claim was neither second or successive, it was not subject to the restrictions on such petitions imposed by § 2244(b). The Court of Appeals therefore dismissed "as unnecessary" Mr. Martinez-Villareal's motion for leave to file a habeas petition in the district court, and transferred the petition to the district court "pursuant to 28 U.S.C. § 2241(b)." JA 194.

One member of the panel, Judge T. G. Nelson, wrote separately, concurring in the result, and expressing his view that "the 1996 Act unconstitutionally suspends the writ of habeas corpus as to competency to be executed

claims." JA 194. Thus, the Suspension Clause issue on which Arizona seeks review in this Court was deemed controlling by only one member of the three-judge panel below.

SUMMARY OF ARGUMENT

The Court of Appeals below correctly interpreted the restrictions imposed upon "second or successive" petitions by amended § 2244(b) as inapplicable to Mr. Martinez-Villareal's competency to be executed claim that was diligently raised in his first petition and was not decided on the merits but was dismissed without prejudice as premature. Arizona's reading of this statute to bar the second of any two petitions filed by the same state prisoner – even where, as here, the later petition arises out of state proceedings postdating the earlier one and which the federal courts expressly refused to anticipate as unripe at the time of the first petition – is unreasoned, irrational, and inequitable. Neither Arizona nor any of its *amici* offers any real justification for construing the statute in this perverse manner, and there is none.

The arbitrary and unjustified interpretation which the State and its *amici* foist upon the statute is simply a subterfuge to let them make the arguments about the Suspension Clause which they are manifestly eager to press upon this Court although the present case provides no colorable occasion for adjudicating any Suspension Clause issue. This Court should decline the gambit, follow its usual, sensible rule against deciding serious constitutional questions needlessly, and give a sensible

construction to the "second or successive" language of amended § 2244(b), as did the court below. Such a construction will, quite properly, postpone consideration of Suspension Clause issues until some case genuinely puts them into controversy.

Compelling reasons also exist for this Court to decline jurisdiction over this case. Arizona concedes that this Court would have no jurisdiction to review the lower court's ruling if the State had prevailed, *see* 28 U.S.C. § 2244(b)(3)(E), but contends that this Court should exert jurisdiction to review the ruling because Mr. Martinez-Villareal prevailed. The statute and reason stand solidly against such a result.

ARGUMENT I

THE COURT BELOW PROPERLY HELD THAT A PETITION CONTAINING MR. MARTINEZ-VILLAREAL'S COMPETENCY CLAIM, WHICH HAD BEEN PRESENTED IN HIS FIRST PETITION BUT DISMISSED WITHOUT PREJUDICE AS PREMATURE, IS NOT A "SECOND OR SUCCESSIVE" CLAIM UNDER § 2244(b).

A. The phrase "second or successive" used in § 2244(b) demands construction and cannot have the absurd meaning Arizona claims is "plain".

Arizona and its *amici* go to great lengths to construct a Suspension Clause issue where none exists.[6] The most

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[6] In the court below, Arizona claimed that there was no Suspension Clause issue because of this Court's original jurisdiction. In its attempt to concoct a vehicle for its novel and complex Suspension Clause theory, Arizona has now admittedly reversed its position. Petitioners' Brief, p. 13 n.1.

conspicuous thing about all of their briefs is the absence of a single syllable explaining why the language of amended § 2244(b), "second or successive habeas corpus application," should be construed as applying to Mr. Martinez-Villareal's case and thereby raising the Suspension Clause issues that they argue elaborately for upwards of 70 pages.

Arizona begs the whole question of statutory construction and vaults into constitutional orbit by declaring that "the plain meaning of § 2244(b) as amended requires . . . [Mr. Martinez-Villareal's] new petition to be treated as successive," Petitioners' Brief, p. 12, and that the Ninth Circuit's "reconstruction of the statute," *id.*, p. 10, can be justified only by dragging the Suspension Clause into the case. Amicus Criminal Justice Legal Foundation ("CJLF") does the same thing. CJLF Brief, p. 7 ("The relevant statutory language in the present case is unambiguous." . . . "The Court of Appeals ignored the plain language of § 2244(b)."). Amici States similarly assume, with no explanation, that this is a "second" application case calling for radical Suspension Clause analysis. But the idea that Mr. Martinez-Villareal's present habeas application is a "second" one, or that the language "second or successive" in amended § 2244(b) has a *plain meaning* which is found by adding one plus one and making two, is either very naive or altogether disingenuous.

To see why, it is sufficient to observe that the same language, "claim presented in a second or successive habeas corpus petition" is used both to prohibit claims "presented in a prior application" by amended § 2244(b)(1) and to restrict claims "not presented in a prior application" by amended § 2244(b)(2). So, consider the commonplace situation of an individual who is convicted of a crime in state court, *successfully* challenges that conviction in a federal habeas corpus proceeding, is retried and reconvicted for the same crime, and files a new – and numerically "second" – federal habeas corpus application challenging this new conviction. Or consider the situation of an individual who is convicted in state court of a first criminal act, *X*, challenges that conviction in an unsuccessful federal habeas corpus petition, serves his or her time, commits a second crime after being released, is convicted of this new crime, *Y*, and files a new – i.e., numerically "second" – federal habeas corpus application challenging the conviction for *Y*. Are either of these cases of a "second or successive habeas corpus application" within the compass of § 2244? Whatever the answer to this question (to which we will return in a moment), it can hardly be derived from the "plain meaning" of § 2244(b) or one-plus-one mathematics. Nor does any supposed "plain meaning" of "second" speak "unambiguously" to such obvious cases as those of a prisoner who first files an unsuccessful federal habeas corpus petition challenging his state conviction for constitutional trial error and later files another federal habeas corpus petition challenging the constitutionality of a revocation of parole, *see, e.g., Morrissey v. Brewer*, 408 U.S. 471 (1972) – or of an arbitrary denial of a state-created right to

"good time" credit – on the sentence imposed upon the original state-court conviction. *See, e.g., Lynce v. Mathis*, 117 S.Ct. 891 (1997).

To decide each of these cases, a court must do exactly what the Court of Appeals below did: it must **construe** the statutory language "second or successive habeas corpus application" in a way that makes sense, considering the statutory wording, structure, and purpose – together, of course, with principles such as the canon preferring constructions that avoid raising grave constitutional questions[7]; it cannot simply incant "two applications by the same petitioner means the numerically second one is always out of court." And, a moment's consideration of that unavoidable question of statutory construction will reveal, for example, that "second" applications are routinely entertained where a defendant challenges multiple judgments of conviction or sentence,[8]

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[7] Arizona's brief seems to suggest that, in order to bring the canon into play, a court must first decide the constitutional question on the merits and then construe the statute to avoid reaching whatever result it has held unconstitutional. Petitioners' Brief, pp. 18-19. As the Court has said time and again, however, the canon cannot seriously " 'be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such a ruling was unnecessary. . . . ' " *United States v. CIO*, 335 U.S. 106, 121 n.20 (1948), *quoting United States v. Delaware & Hudson Co.*, 213 U.S. 366, 407-408 (1909). *See also, e.g., Blodgett v. Holden*, 275 U.S. 148, 148 (1927); *United States v. Jin Fuey Moi*, 241 U.S. 394, 401 (1916); *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

[8] *See, e.g., United States v. Scott*, 124 F.3d 1328 (10th Cir. 1997) (on first § 2255 petition, court granted a new sentencing hearing and appeal; subsequent § 2255 petition challenging

or where the validity of a conviction and sentence has been upheld but, as in *Morrissey v. Brewer*, *supra*, a prisoner's parole is later denied or revoked in violation of the Constitution.[9] The "second" application challenging the new conviction, sentencing or parole revocation is not barred by § 2244(b) (or by the prior abuse of the writ doctrine, as the case may be) because the subject matter of the petition itself – the new conviction, sentence or parole violation – had not yet occurred and could not possibly have been challenged at the time of the earlier petition. Similarly, it would be absurd to deny a prisoner's "second" habeas petition in a case such as *Weaver v. Graham*, 450 U.S. 24 (1981), involving an ex post facto change in a prisoner's eligibility for release, because he

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effectiveness of trial and appellate counsel in those new proceedings was not a second or successive petition within § 2244); *Palmer v. Clarke*, 961 F.2d 771, 774 (8th Cir. 1992) (second § 2254 petition challenging third conviction and resulting sentence that had not yet occurred at time first petition was filed was proper); *Richmond v. Ricketts*, 774 F.2d 957, 960 (1985) (second § 2254 petition attacking constitutionality of resentencing that had not yet occurred at time first § 2254 petition was filed was proper).

[9] *See, e.g., Chambers v. United States*, 106 F.3d 472 (2nd Cir. 1997) (§ 2255 petition asserting challenge to conviction is not second or successive petition within § 2244 where earlier petition challenged Parole Commission's computation of sentence); *see also Thompson v. White*, 661 F.2d 103 (8th Cir. 1981) (prisoner's first habeas petition challenging conviction heard on the merits), *Thompson v. Armontrout*, 808 F.2d 28 (8th Cir. 1986) (same prisoner's second habeas petition challenging vindictive denial of parole granted), *Thompson v. Armontrout*, 926 F.2d 396 (8th Cir. 1991) (granting same prisoner's third habeas petition challenging parole board's subsequent refusal to grant credit for time served).

had filed an earlier application – before the release-eligibility – alleging constitutional error in his trial and sentencing.

Mr. Martinez-Villareal's petition is on the same footing. He raised his competency to be executed claim at the first opportunity he had: in the first habeas petition. There Arizona insisted and the federal courts held that the claim was premature and dismissed it without prejudice because the event that made the claim adjudicable, the issuance of an execution warrant, had not yet occurred.[10] This is no different from the situation of a "second" petition by the same prisoner raising challenges to new convictions or sentences, parole revocation, or denial of good time credits, which cannot be adjudicated until the occurrence of the later event that gives rise to the challenge. At the time Mr. Martinez-Villareal's counsel requested permission from the court below to file a second petition the subject matter of that petition had occurred: on the State's motion, the Arizona Supreme Court had issued a warrant to execute Mr. Martinez-Villareal while he is not mentally fit. JA 27, 109.[11] Just as

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[10] This was the very point Arizona itself made in its motion for summary judgment, requesting that the competency to be executed claim be dismissed as unripe because "[o]nly if a warrant for [Mr. Martinez-Villareal's] execution issues . . . will there be a jurisdictionally sufficient case or controversy . . . " JA 6.

[11] The habeas petition that the decision below permits Mr. Martinez-Villareal to file contains no challenge to the validity of his trial or sentence. It is concerned solely with the state proceedings that have taken place since his earlier federal habeas petition – the warrant of execution, issued by the Arizona Supreme Court on the State's motion, that ripened his

petitioners in cases such as *Weaver* and *Morrissey* can use a "second" petition to challenge administrative actions subsequent to their convictions that affect not the existence but the execution of their sentences, so too, can Mr. Martinez-Villareal now challenge his competency to be executed.[12]

The court below also analogized Mr. Martinez-Villareal's situation to cases in which previously "mixed" petitions, *see Rose v. Lundy*, 455 U.S. 509, 520 (1982), were refiled after exhaustion of state remedies. JA 188-89. *See Reeves v. Little*, 120 F.3d 1136, 1139 (10th Cir. 1997) (second petition raising claims following exhaustion is not "second or successive" within § 2244(b) where prior petition alleging state court delay in processing direct appeal was dismissed without prejudice); *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997) (second petition is not "second or

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competency to be executed claim, and the Arizona superior court order finding him competent for execution – which authorize the imminent executive action of putting him to death while he is incompetent. JA 27; *see McIntosh v. United States Parole Commission*, 115 F.3d 809, 811 (10th Cir. 1997) ("Petitions under § 2241 . . . attack the *execution* of a sentence, in contrast to § 2254 habeas and § 2255 proceedings, which . . . collaterally attack the validity of a conviction and sentence [citations omitted] . . . "; section 2241 attack "may challenge some matters that occur at prison, such as deprivation of good-time credits and other prison disciplinary matters . . . ") (emphasis added).

[12] Mr. Martinez-Villareal's application for the writ alleges not only that he is incompetent to be executed but also that the state court order finding him competent for execution was unconstitutional because of procedural defects which resulted in an unreliable determination of the issue. *See Ford v. Wainwright*, 477 U.S. at 423-24 (Powell, J., concurring in part and concurring in judgment).

successive" under § 2244(b) where prior petition was dismissed without prejudice to exhaust state remedies); *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996) (same). In those cases, like this one, the statutory language "second or successive . . . application" requires intelligent construction, not the wilful disregard with which Arizona and its *amici* would treat it under guise of a "plain meaning" that vanishes as soon as real cases are considered.

The fact is that "second and successive" has no "plain meaning" that can be read on an abacus, without reference to its statutory context. The language did not originate with the AEDPA. It was a familiar feature of the doctrine of abuse of the writ before 1996. *See, e.g. Barefoot v. Estelle*, 463 U.S. 880, 895 (1983) ("[s]econd and successive federal habeas petitions present a different issue" because of possible manipulation); *McCleskey v. Zant*, 499 U.S. 467, 470 (1991) ("[t]he doctrine of abuse of the writ defines the circumstances in which federal courts decline to entertain a claim presented for the first time in a second or subsequent petition for a writ of habeas corpus"); Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts. The courts did not imagine that it was susceptible of merely mathematical computation then. *See, e.g., Lonchar v. Thomas*, 517 U.S. 314 (1996) (treating a federal habeas petition filed by an inmate as a first petition despite the two earlier next-friend federal habeas petitions reviewed in *Lonchar v. Thomas*, 58 F.3d 588 (11th Cir. 1995)); pre-AEDPA cases cited in notes 8 and 9, *supra*. Congress could not have imagined that it meant a numerically "second habeas application by the same person challenging any state court judgment or executive action whatsoever" rather

than a "second application by the same person challenging the same state court judgment" when it adopted the language in the AEDPA's amendments to § 2244(b). Nor could Congress have imagined any reasonable construction of the language "claim presented in a second or successive habeas corpus application . . . that was presented in a prior application" (amended § 2244(b)(1)) and "claim presented in a second or successive habeas corpus application . . . that was not presented in a prior application" (amended § 2244(b)(2)) which includes claims presented in the **only** petition in which a federal court is able to hear them at all.

B. Arizona's brief omits the fact that counsel's attempts to assert Mr. Martinez-Villareal's competency claim at the earliest possible time were frustrated by the State's successful efforts to avoid adjudication.

Arizona's position is based entirely upon the false premise that "Martinez-Villareal undeniably has already had one *fully-litigated* habeas petition . . . " Petitioners' Brief, p. 12. (emphasis added). To the contrary, in response to Mr. Martinez-Villareal's earlier petition, the State successfully urged the courts not even to begin to litigate the claim which is now in issue. JA 112-113.

The procedural history of Mr. Martinez-Villareal's competency to be executed claim recounted at pages 4-12 above illustrates why the Court of Appeals correctly found that this claim is not encompassed in Congress's prohibition of "second or successive" petitions. After Arizona had convinced the district court and Court of

Appeals that the claim was too early to decide in the first habeas application because an execution warrant had not yet issued, Arizona turned around and argued to these same courts that the claim was too late even though Mr. Martinez-Villareal's counsel at all times acted diligently and raised it at the first opportunity, and Mr. Martinez-Villareal was now under imminent threat of execution. The district court, after initially stating that it "ha[d] no intention of treating the 'incompetency to be executed' claim as a successive petition" under the AEDPA amendments to § 2244, reversed its position at Arizona's insistence, although apparently with some reluctance. JA 101-105.

The Court of Appeals, however, disagreed with the district court that the AEDPA should be construed to permit state officials to assert that a habeas petition is a "second" application barred by § 2244(b) when it is predicated solely on a claim which those state officials have successfully delayed by arguing that the claim was premature at the time of an earlier petition and had to be postponed in order to mature into a "jurisdictionally sufficient case."[13] This construction took Arizona's

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[13] Because of this unique history, Arizona could and should be held to have waived the right to assert a "second or successive application" defense against Mr. Martinez-Villareal's competency claim, even if that label could properly be attached to it. Certainly, the defense would have been held waived if the enactment of the AEDPA had not intervened; when Arizona asked that consideration of the competence to be executed issue be postponed, it knew it was giving up any argument that a later petition raising that issue should be deemed "second or successive" because that same phrase appeared in Rule 9(b). Section 2244(b) of the AEDPA could vitiate that waiver only if

earlier successful argument and the earlier explicit holdings of the federal district and circuit courts based

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the "second or successive application" defense it creates were jurisdictional and thus nonwaivable. Contrary to the position taken by the Amici States (p. 5-10), it is not.

As this Court said in *Felker v. Turpin*, 116 S.Ct. 2333, 2339 (1996), and as Arizona itself acknowledges, by its terms § 2254(b) places "restrictions on successive petitions," Petitioners' Brief, p. 16, rather than withdrawing jurisdiction to consider them. Its subsections do not purport to withdraw the judicial power to hear cases, but instead require that certain "claim[s] . . . shall be dismissed." 28 U.S.C. § 2254(b)(1), (2) and (4). That language resembles the terms of the other most common habeas defenses, nonexhaustion and procedural default: the exhaustion statute, 28 U.S.C. § 2254(b), says a noncomplying "application . . . shall not be granted"; the procedural default rule established by this Court's cases "bar[s] consideration . . . of federal claims that have been defaulted," *Trest v. Cain*, 117 S.Ct. 1517, 1522 (1997). This Court has held both of these defenses to be nonjurisdictional and thus waivable. *See Granberry v. Greer*, 481 U.S. 129 (1987) (nonexhaustion); *Trest v. Cain, supra* (procedural default).

Pre-AEDPA law similarly recognized that the "second or successive" petition defense could be waived. *Sanders v. United States*, 373 U.S. 1, 11 (1963). The AEDPA's restrictions on successive petitions are "well within the compass" of the pre-AEDPA law and thus " 'informed and controlled by historical usage, statutory developments, and judicial decisions.' " *Felker v. Turpin*, 116 S.Ct. at 2341, *quoting McCleskey v. Zant*, 499 U.S. 467, 489 (1991). Recognition of the similar historical context in which the exhaustion rule was codified was one of the factors that led the Court to hold that "though to be strictly enforced, [it] is not jurisdictional." *Strickland v. Washington*, 466 U.S. 668, 684 (1984), *citing Rose v. Lundy*, 455 U.S. at 515-520. If the issue were reached – which for the reasons explained above we submit it need not be – the same should be held with respect to the similarly-worded habeas defense at issue here.

upon that argument as its premise, and accordingly ruled that:

> Under our holding, a competency claim must be raised in a first habeas petition, whereupon it also must be dismissed as premature due to the automatic stay that issues when a first petition is filed. Once the state issues a second warrant of execution and the state court considers the now-ripe competency claim, a federal court may hear that claim – and only that claim – because it was originally dismissed as premature and therefore falls outside of the rubric of "second or successive" petitions.

JA 193.

As we shall see in the next section, this construction is most consistent with Congress's chosen statutory language and the statutory structure and history. It avoids difficult questions of the statute's constitutionality under the Suspension Clause. And it avoids the manifest absurdity and injustice of construing "second" so that a death-sentenced inmate with a serious claim of mental incompetence to be executed is told *first* that he is too early and "second" that he is too late.

C. The court below properly concluded that Mr. Martinez-Villareal's competency claim is not a "second or successive" application for habeas corpus.

This case involves an unusual circumstance in which a constitutional claim was diligently presented in an earlier petition for habeas corpus, but remained unadjudicated even though it was not subject to any defense of

procedural default or failure to exhaust state remedies. Its deferral was the result of the State's successful efforts to delay adjudication of the competency claim, arguing that "[o]nly if a warrant [of] execution issues . . . will there be a jurisdictionally sufficient case or controversy, and that will be the time to litigate the issue." JA 6. Thus, the court below was faced with a potentially valid constitutional claim, supported by credible evidence, but which remained unheard even though Mr. Martinez-Villareal's counsel had taken every step possible to assert and preserve this claim in state and federal court.[14]

The court below sensibly interpreted the words "second or successive" in 28 U.S.C. § 2244(b) as inapplicable to a later petition presenting only such a claim. Its interpretation is solidly supported by the statutory wording, structure, history, and purpose. By no reasonable construction can the term "second or successive habeas corpus application" in its statutory context be extended to embrace and extinguish Mr. Martinez-Villareal's claim of incompetence to be executed.

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[14] These circumstances distinguish *In re Medina*, 109 F.3d 1556 (11th Cir. 1996), and *In re Davis*, 121 F.3d 952 (5th Cir. 1997). Unlike the petitioners in those cases, Mr. Martinez-Villareal promptly filed his claim of incompetence to be executed at the earliest possible opportunity, in an initial federal habeas corpus petition where it was dismissed without prejudice. *In re Davis*, 121 F.3d at 955. Unlike Medina and Davis, Mr. Martinez-Villareal thus gave the federal courts (and Arizona) every timely and reasonable opportunity to join his attacks on his conviction and sentence with his attack on Arizona's administrative decision to proceed with his execution when he was mentally incompetent.

The court below properly began with the two basic ingredients of sound statutory construction: the text of the statute and a preference for reading it reasonably, so as not to "produce results that were not merely odd, but positively absurd." *United States v. X-Citement Video, Inc.*, 513 U.S. at 69. Although, as we have already seen, the phrase "second or successive" in § 2244(b) has no plain meaning in the sense of an unambiguous, self-evident application to every situation in which two or more federal habeas corpus petitions are filed, it does have a recognizable meaning that excludes the present case.

At the least, to constitute a "second" federal habeas petition on behalf of a person imprisoned under a state court judgment, there must be a second petition on the part of *the same person* attacking *the same judgment*. This much is implicit in the statutory text now.

- Subsections 2244(b)(1) and (2) as revised by the AEDPA both refer in terms to cognate § 2254 of title 28: The exact, identical language of both subsections is "second or successive habeas corpus application *under section 2254*." *See* Appendix A to Petitioners' Brief, pp. App. 1-2 (emphasis added).

- When enacting these revisions, Congress carried forward, unamended, the longstanding language of 28 U.S.C. § 2254(a) that states what a "habeas corpus application under section 2254" is: namely, "an application for a writ of habeas corpus in behalf of a person in custody pursuant to *the judgment of a State court*." *Id.*, at p. App. 5 (emphasis added).

- The language of the preface to subsection 2254(b)(1) – only slightly amended by the

AEDPA – and that of the almost totally rewritten subsections 2254(d) and 2254(e)(1) repeats this formulation virtually verbatim: They all talk about an "application for a writ of habeas corpus on behalf of [*or* by] a person in custody pursuant to *the judgment of a State court*." *Id.* at App. 5-6 (emphasis added).

- Logically, a "second" *anything* becomes identified as such only by sharing the defining characteristics of the first; and there is no suggestion in § 2254 that the "judgment of the State court" which is the subject of the kind of "habeas corpus application" it defines is less essential to the definition than the "person" filing the application.

So if, as *Lonchar* teaches, a petition by a different person is not a "second or successive habeas corpus application under section 2254," neither is a petition occasioned by a different state court judgment.

And this, of course, is what the courts have held, both before and after the amendment of § 2244(b) by the AEDPA. *See* notes 8 and 9, *supra*. Federal habeas petitions raising claims of incompetence to be executed are not addressed to the state court judgment of conviction and sentence but (depending on the local state procedure) to a state court determination of present competency or a state executive decision to go forward with the execution of an incompetent. *See* notes 11 and 12, *supra*. Hence it is not surprising that claims of incompetence to be executed have almost always been entertained in a federal petition filed after the denial of an earlier petition challenging the

underlying conviction and sentence – as in Alvin Bernard Ford's own case, *Ford v. Wainwright*, 477 U.S. 399 (1986).[15] But if Arizona's arguments below and to this Court are correct, the AEDPA's amendments to § 2244(b) changed all this without changing – and indeed while still explicitly referring to – statutory language ("application . . . in behalf of a person in custody pursuant to the judgment of a State court," 28 U.S.C. § 2254(a)) that answers the question " 'second' what?" in a manner that makes the instant petition Mr. Martinez-Villareal's "first." And those amendments changed prior practice based on words that remain in the statute

- **not** in the service of "finality of determination" – the title of § 2244(b) – since there has never been **and never can be** any "determination" relating to the subject matter of the later habeas corpus application, the applicant's competence to undergo execution, and

- **not** to impose "on successive petitions . . . a modified res judicata rule, a restraint on . . . 'abuse of the writ' " – the aim of amended § 2244(b) as this Court correctly construed the amendment in *Felker v. Turpin*, 116 S.Ct. at 2340[16]

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[15] *See Barnard v. Collins*, 13 F.3d 871, 878 (5th Cir. 1994), quoted by the court below at JA 193 n.7: "[O]ur research indicates no reported decision in which a federal circuit court or the Supreme Court has denied relief of a petitioner's competency-to-be-executed claim on grounds of abuse of the writ."

[16] The stated purpose of the AEDPA is "to curb the abuse of the statutory writ of habeas corpus, and to address the acute problems of unnecessary delay and abuse in capital cases." Joint Explanatory Statement of the Committee of Conference, H.R.

– since there has never been **and never can be** any opportunity to adjudicate a claim of incompetence to be executed,[17] and since an applicant in Mr. Martinez-Villareal's circumstances has never done anything constituting abuse of the writ **and never can** do anything differently than he has done to present and preserve his claim of incompetence; and

• **not** to limit state prisoners to "one bite at the apple" – as Arizona itself describes the "intent" of the AEDPA, Petitioners' Brief, p. 12[18] – since an applicant in Mr. Martinez-Villareal's circumstances can never get even "one bite" at a claim of incompetence to be executed,

but because claims of incompetence to be executed **are inherently incapable of being presented in any federal habeas corpus petition that is not either too early or too**

Conf. Rep. No. 518, 104th Cong., 2d Sess. 111 (1996), reprinted in 1996 U.S.C. Cong. & Admin. N. 924, 244; *see also* 141 Cong. Rec. S7479-03 (daily ed. May 25, 1995) (statement of Sen. Hatch) (AEDPA prevents delay "while still preserving and protecting the constitutional rights of those who are accused").

[17] A " 'full and fair opportunity to litigate' the case . . . is a prerequisite to application of principles of res judicata. *Montana v. United States*, 440 U.S. 147, 153 (1979); accord, *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 329 (1971)." *Poyner v. Murray*, 508 U.S. 931, 933 (1993) (opinion of Souter, J., joined by Blackmun, J. and Stevens, J., respecting the denial of certiorari).

[18] *See also* 141 Cong Rec. S7663 (daily ed. June 5, 1995) (statement of Sen. Feinstein): "[T]his bill provides habeas petitioners with one bite of the apple. It assures that no one convicted of a capital crime will be barred from seeking habeas relief in Federal Court."

late. Nothing in the AEDPA remotely suggests that Congress meant the term "second" to categorically preclude the presentation of a previously recognized substantive federal constitutional claim in a **first** or **any possible** habeas corpus application, as Arizona's interpretation of the statute would do.

Further, to constitute a "second" federal habeas petition on behalf of a person imprisoned under a state court judgment, there must be a "first" petition in which the challenge to the judgment could possibly have been presented on the merits. The lower courts have held that the dismissal of an earlier petition without prejudice for reasons such as nonexhaustion does not operate to make a later petition a "second . . . application" under amended § 2244. *Camarano v. Irvin*, 98 F.3d 44 (2d Cir. 1996); *In re Turner, supra*; and *see Christy v. Horn* 115 F.3d 201 (3d Cir. 1997), all cited by the court below at JA 189; *Dickinson v. Maine*, 101 F.3d 791 (1st Cir. 1996); *In re Gasery*, 116 F.3d 1051 (5th Cir. 1997). But whether or not that result should obtain in a case in which the reason for the dismissal of the prisoner's earlier petition was a matter within his or her control, it is the only intelligent construction of amended § 2244(b) in a case where the earlier petition was dismissed without a decision on the merits **and** without any fault or choice of the petitioner. *Cf. Lonchar v. Thomas, supra*. A fortiori, it is the only tenable result in a case like the present one, where Mr. Martinez-Villareal did everything possible to present his claim of incompetence in his initial federal petition and was denied the opportunity to have it heard on the merits because the State successfully contended that the claim was not yet

ripe and should be deferred for consideration in a subsequent proceeding. *Cf. Burris v. Park*, 95 F.3d 465 (7th Cir. 1996).

ARGUMENT II.

THE COURT BELOW MADE NO MISTAKE IN CONCLUDING THAT ONE CONSIDERATION FAVORING ITS CONSTRUCTION OF § 2244(b) WAS THE FACT THAT ARIZONA'S PROPOSED CONSTRUCTION OF THE STATUTE WOULD RAISE SERIOUS SUSPENSION CLAUSE ISSUES.

As we have seen, the decision of the court below turns on a reasonable construction of § 2244(b), independent of the Suspension Clause. But the court was also plainly right to take account of the "one doctrine more deeply rooted than any other in the process of constitutional adjudication . . . that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Specter Motor Service v. McLaughlin*, 323 U.S. 101, 105 (1944).

This Court has largely succeeded in avoiding the necessity for interpreting the Suspension Clause during more than 200 years, and the provision's interpretation poses a host of complicated and debatable issues. *See, e.g., Felker v. Turpin*, 116 S.Ct. at 2340; *Lonchar v. Thomas*, 116 S.Ct. at 1298; James S. Liebman, *Apocalypse Next Time?: The Anachronistic Attack On Habeas Corpus/Direct Review Parity*, 92 COLUM.L.REV. 1997, 2041-2072 (1992). The wisdom of the court below in steering wide of this constitutional *terra incognita* is demonstrated by the briefs of Arizona and its *amici* in this Court, the bulk of which are spent trying to answer difficult, abstract constitutional

questions not presented by the case.[19] And even these 70 pages of elaborate briefing manage to ignore or beg major questions that would have to be faced if the Court undertook to address the Suspension Clause issues which would arise on the hypothesis that Congress really did extinguish a forum for Mr. Martinez-Villareal's *Ford v. Wainwright* claim of incompetence to be executed. Arizona and its *amici*, for example, treat this subject as though it had to do entirely with federal habeas corpus in its most usual Twentieth Century office as a **postconviction** remedy, although, historically and analytically, a *Ford* claim has considerably less in common with postconviction review than with the older Anglo-American usages of the writ to remedy executive illegalities dependent on custody.

However this may be, the more fundamental point disregarded by Arizona and its *amici* is that their ranging constitutional arguments simply have no place in this case unless the Court is *first* compelled to conclude that the AEDPA cannot be read to avoid reaching constitutional issues of this magnitude. *United States v. X-Citement Video, Inc.*, 513 U.S. at 69. This does not mean, as Arizona

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[19] The CJLF brief enlarges on yet another theory not presented here: that a competency to be executed claim does not fall within the definition of "custody" for habeas relief. Unraised by any party to this case anywhere, at any time, that question, too, presents daunting issues that need not, and should not, be resolved now. It is enough to say that CJLF's argument would have to swim upstream. *See Ford v. Wainwright*, 477 U.S. at 427 (Powell, J., concurring in part and concurring in the judgment).

affects to believe, that the proponent of a particular statutory construction must first establish, or that this Court must first decide, whether any other construction of § 2244(b) would violate the Constitution. It means just the opposite: that the "Court will not pass on the constitutionality of an Act of Congress if a construction of the Act is fairly possible, or some other nonconstitutional ground fairly available, by which the constitutional question can be avoided." *United States v. Locke*, 471 U.S. 84, 92 (1985). *See* note 7, *supra*. The court below correctly determined that the constitutional question could be avoided, and correctly avoided it.[20] That approach to the case was consistent with this Court's approach to previous cases in which Suspension Clause complexities lurked but were avoidable by reasonable statutory construction. *Sanders v. United States*, 373 U.S. 1, 11-12 (1963); *United States v. Hayman*, 342 U.S. 205, 223 (1952).

In addition to Suspension Clause concerns, the court below was concerned with the unusual, if not unprecedented, situation in which a habeas petitioner, whose conduct with respect to his competency claim was beyond reproach, could nevertheless be denied any opportunity for federal consideration of the claim if the AEDPA were applied and construed so as to upset the

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[20] Arizona also argues now – although it argued the exact opposite in the court below – that its interpretation of the § 2244(b) restrictions applies as well to this Court's original habeas jurisdiction. Petitioners' Brief, pp. 12-17. The State's manipulation of this unpresented issue is designed to undergird its next argument: that the suppositious § 2244(b) restrictions do not violate the Suspension Clause. As we have shown, *that* issue, too, is not presented.

expectations that underlay and resulted from the dismissal of his pre-AEDPA habeas petition without prejudice. Counsel for Mr. Martinez-Villareal particularly emphasized this concern. JA 124-125. In the wake of *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), it might have taken the form of the retroactivity analysis suggested by this Court's observation in *Lindh* that, while the AEDPA generally applies to habeas petitions filed after the Act's effective date, the invocation of specific provisions of the Act to defeat expectations settled by explicit court order before its enactment "may well . . . [raise] difficult issues, and it may be that application of *Landgraf*'s default rule will be necessary to settle some of them," *id.* at 2064.[21] However, the court below handed down its decision on the same day that this Court delivered the *Lindh* opinion, so it did not have that suggestion available. *See* note 4, *supra*.

In sum, a whole host of challenging constitutional questions could be injected into this case, and into cases that come after it, if Arizona's proposed construction of § 2244(b) were accepted. The court below wisely chose not to reach and decide those issues, because Arizona's statutory argument was not sufficiently persuasive to require it.

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[21] It might also have taken the form of holding that betrayal of the prior assurances given to Mr. Martinez-Villareal and his counsel by both the State and the courts would violate due process. *Cf. Raley v. Ohio*, 360 U.S. 423 (1959).

ARGUMENT III.

CONGRESS HAS PLAINLY WITHDRAWN CERTIORARI JURISDICTION OVER ARIZONA'S PETITION, AND THIS CASE PRESENTS NO EQUITABLE BASIS FOR INVOKING THIS COURT'S POWER TO ISSUE EXTRAORDINARY WRITS.

A. No Statutory Certiorari Jurisdiction Exists.

Arizona's certiorari petition presents this Court with a classic conundrum. On the one hand, it complains that the AEDPA bars the ruling of the court below allowing Mr. Martinez-Villareal to finally obtain an adjudication of his competency claim. If it is correct that § 2244(b) applies, then it is saddled with § 2244(b)(3)(E), which, unlike § 2244(b)(1), is very explicit. The statute states:

> The grant or denial of an authorization by a court of appeals to file a second or successive application . . . *shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.*

28 U.S.C. § 2244(b)(3)(E) (emphasis added).

Section 2244(b)(3)(E) defeats Arizona's attempted resort to certiorari twice over. On the one hand, Arizona argues that Mr. Martinez-Villareal's present application for habeas relief is a "second" application. The court below has ruled that the district court should consider this application. Arizona, therefore, is now asking this Court to review the Court of Appeals' grant of authorization for Mr. Martinez-Villareal to file what Arizona contends is a second application. The statute, however, provides that the "grant . . . of an authorization by a court

of appeals to file a second . . . application" shall not be reviewable.

Alternatively, looking at what Arizona asks this Court to do (rather than from the perspective of what the court below did), Arizona asks this Court to hold that the court below should have denied Mr. Martinez-Villareal authorization to file a second habeas application. The "denial of an authorization" is then "the subject of" Arizona's certiorari petition. Petitions on that subject, however, are expressly prohibited by the statute.

These conclusions are supported by additional considerations. First, had the court below ruled the way Arizona wanted it to, that ruling (a denial of authorization to file a second application) would plainly be covered by the statutory limitation and would not be subject to this Court's review. That was indeed exactly the situation in *Felker v. Turpin*, 116 S.Ct. at 2341, in which the Court dismissed the petition for writ of certiorari "for want of jurisdiction." By using the words "grant *or* denial," the statutory provision demonstrates Congress's intention that reviewability of a court of appeals' gatekeeper decision should not turn on which way the court of appeals rules. That is, it is not only denials of authorization (what Arizona sought) that are nonreviewable; grants are also not reviewable. Arizona concedes that if it had prevailed in the court below on the issue of Mr. Martinez-Villareal's authorization to file, that decision would not be reviewable in this Court. Petitioners' Brief, p. 47. In view of Congress's even-handed approach, it makes no sense to say that cases are not reviewable when the State prevails, but are reviewable when it does not.

Second, nonreviewability is supported by the evident congressional purpose in banning this Court's interlocutory review of gatekeeper decisions. Congress apparently wanted to speed up final disposition of successor petitions by having the court of appeals make a preliminary, nonreviewable interlocutory decision whether such petitions should be heard. If the court of appeals decides that a successor petition should not be heard, that is the end of it. If, on the other hand, it decides that a successor petition should be heard, then there is to be no delay caused by interlocutory review of that gatekeeper decision. The district court is to proceed to consider the habeas petition without having to wait for possible filing and disposition of a petition for certiorari by the State. If the court of appeals' gatekeeper decision was wrong, and if it results in habeas relief actually being given, the gatekeeper error can eventually be corrected by this Court's review of the ultimate habeas relief. Thus, this Court retains the power to cure gatekeeper errors when they actually lead to habeas relief while, at the same time, the Court is not burdened by – and the Court's certiorari jurisdiction does not serve to delay – proceedings in the large number of cases in which the courts of appeals' gatekeeper decision is correct. This result obtains even where a court of appeals decides, as the court below did here, that the § 2244(b) restrictions do not apply. Section 2244(b)(3)(E) "precludes . . . [this Court] from reviewing, by appeal or petition for certiorari, a judgment on an application for leave to file a second habeas petition in district court . . . ," *Felker v. Turpin*, 116 S.Ct. at 2338-39; and the decision below is "a judgment on an application

for leave to file a second habeas petition in district court." JA at 180.

Arizona's attempt to sidestep the application of this bar on the ground that Mr. Martinez-Villareal's motion was "dismissed" rather than "granted" or "denied" must fail. Congress's reasons for barring this Court's review of gatekeeper decisions are no different when a court of appeals holds that the § 2244(b) restrictions do not apply (because the petition is not successive) than when it holds that the standards do apply but the petitioner has met them. In both cases, interlocutory review would be equally burdensome and dilatory, and equally unnecessary since this Court will always have the opportunity to correct any gatekeeper errors if, and after, they result in relief being granted.

B. No Compelling Reasons Exist For An Extraordinary Writ.

The State's attempts to invoke this Court's power to issue an extraordinary writ should also fail. There is absolutely no cause for the Court to exercise its exceptional powers in this case.

Congress has precluded review of the courts of appeals' gatekeeper decision by certiorari. In the absence of compelling reasons, it would inappropriately circumvent that limitation to issue an extraordinary writ. What compelling reason does Arizona advance? It "desire[s] the district court to be prohibited from entertaining Martinez-Villareal's successive habeas petition." Petitioners' Brief, p. 48. This is exactly what Congress said this Court should not do when a court of appeals has granted leave

to proceed. Arizona inflates its desire by puffing it up with the rhetoric of "usurpation of judicial power." *Id.* This is the same hollow claim that underlies its efforts to turn the Court of Appeals' perfectly reasonable, unremarkable statutory construction into an occasion for unprecedented Suspension Clause adjudication.

Arizona never explains how it meets the first requirement of Supreme Court Rule 20, that the requested action sought through an extraordinary writ "must be in aid of this Court's appellate jurisdiction." Congress withdrew the Court's certiorari jurisdiction over gatekeeper decisions in the manifest belief that interlocutory review would not ordinarily be in aid of the Court's ultimate appellate jurisdiction over a habeas case, once a final judgment is rendered in the lower courts. Arizona does not say why that jurisdiction is not adequate to protect its interests.

Finally, Arizona's conduct in the underlying litigation disentitles it to the equitable relief that it seeks. The record reflects that counsel for Arizona is the person who originally sought bifurcation of the issues presented in Mr. Martinez-Villareal's prior habeas petition. JA 4-6. It was counsel for Arizona who persuaded the district court to delay ruling on Mr. Martinez-Villareal's competence until a later stage of litigation. In asking for an extraordinary writ, counsel for Arizona now seeks to enjoin the courts below from implementing the relief which Arizona itself requested and obtained – that "if a warrant for [Martinez-Villareal's] execution issues, . . . that will be the time to litigate the issue." JA 6. Since Arizona is entirely responsible for the procedural posture of the competency claim, it is not entitled to equitable relief from its own

doings. *See United States ex rel. Greathouse v. Dern*, 289 U.S. 352, 359 (1933) ("Although the remedy by mandamus is at law, its allowance is controlled by equitable principles").

CONCLUSION

For the foregoing reasons, this Court should decline jurisdiction in this case, or alternatively, affirm the judgment below.

Respectfully submitted,

PAUL BENDER
Arizona State University
College of Law
Tempe, AZ 85287-7906
(602) 965-2556

SEAN D. O'BRIEN
Public Interest Litigation Clinic
5319 Rockhill Road
Kansas City, MO 64110
(816) 363-9371

FREDRIC F. KAY
Federal Public Defender
DENISE I. YOUNG
DALE A. BAICH
Assistant Federal Public Defender
97 E. Congress Suite 130
Tucson, AZ 85701-1716
(520) 620-7043

Attorneys for Respondent

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